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Supreme Court, U.S.
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NUMBER _____

UNITED STATES SUPREME COURT

OCTOBER, 1992 TERM

KAREN R. LUNDE,

PETITIONER

vs.

IOWA BOARD OF REGENTS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WAS PETITIONER DENIED FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION?

2. DID RESPONDENT, AND THE IOWA COURTS, MISINTERPRET AND ERRONEOUSLY RELY ON THE U. S. SUPREME COURT'S DECISION IN BOARD OF CURATORS OF UNIVERSITY OF MISSOURI V. HOROWITZ, 435 U.S. 78, 98 S.CT. 948, 55 L.ED.2D 124 (1978)?

3. DID THE IOWA COURTS ERR IN REFUSING TO APPLY THE BURDEN-SHIFTING MECHANISM USED IN CIVIL RIGHTS CASES TO A MIXED-MOTIVES CASE INVOLVING THE DISMISSAL OF A THIRD-YEAR STUDENT FROM A MEDICAL SCHOOL RECEIVING FEDERAL FUNDS, WHERE BOTH FIRST AMENDMENT AND TITLE IX SEX DISCRIMINATION ISSUES WERE INVOLVED?

LIST OF PARTIES TO THE PROCEEDING

Karen R. Lunde, Petitioner.

Iowa State Board of Regents, Respondent.

[Although not named as parties, the University of Iowa and its College of Medicine are administrative agencies under governing Iowa law, the Iowa Administrative Procedure Act, Chapter 17A, Code of Iowa, and may be thought of as additional respondents. See also footnote 3, page A-3 herein.]

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REFERENCES TO REPORTS OF THE OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

The opinion of the Court of Appeals of Iowa for which review is sought here, pages A-2 through A-26 herein, has not yet been published. According to West Publishing Company, this opinion is scheduled for publication in Northwestern Reporter 2d during the month of September, 1992. It is designated at the present time as 1992 WESTLAW 116785.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) Date of the entry of the judgment sought to be reviewed: March 24, 1992.

(ii) Date of any order respecting a rehearing: Order denying rehearing, April 2, 1992; see page A-55 herein. Order denying further review by the Supreme Court of Iowa, May 28, 1992; see page A-56 herein.

(iii) There has been no cross-petition for a writ of certiorari.

(iv) Statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari: 28 U. S. Code Sec. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdication thereof, are citizens of the United States and of any State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Title 20, U. S. Code, Sec. 1681(a):

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

[From Public Law 92-318, Title IX of the Education Amendments of 1972, as amended.]

Chapter 17A, Code of Iowa, Administrative Procedure Act.

17A.1 Citation and statement of purpose.

* * * 2. This chapter is intended to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public. . . .

17A.2 Definitions.

* * * 2. "Contested case" means a proceeding including but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing.

17A.10 Informal settlements -- waiver.

1. Unless precluded by statute, informal settlements of controversies that may culminate in contested case proceedings according to the provisions of this chapter are encouraged. Agencies shall prescribe by rule specific procedures for attempting such informal settlements prior to the commencement of contested case proceedings. This subsection shall not be construed to require either party to

such a controversy to utilize the informal procedures or to settle the controversy pursuant to those informal procedures.

17A.11 Presiding officer -- administrative hearing officers.

1. The presiding officer in evidentiary hearings required to be conducted by an agency according to the provisions of this chapter governing contested cases shall be the agency, one or more members of a multimember agency, or an administrative hearing officer appointed according to the terms of this section. . . .

17A.12 Contested cases -- notice --hearing -- records.

* * * 4. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved and to be represented by counsel . . .

STATEMENT OF THE CASE

This is the case of a very bright, very young, female medical student, dismissed from medical school **because of something she said**, and **because she did not act feminine enough** to suit some of the faculty members. It is also a case which the medical school has tried to characterize as a dismissal for academic reasons only, but which is actually a mixed-motives civil rights case.

Karen R. Lunde, petitioner, graduated from high school at the age of 16 in the top three per cent of her class. She immediately enrolled in the University of Iowa College of Engineering.

Four years later, in 1985, Karen Lunde graduated with highest distinction with a B.S. degree in Biomedical Engineering. She then enrolled in the Uni-

versity of Iowa College of Medicine, with plans to become a pediatrician.

Ms. Lunde earned passing grades in all of her classes during her first two years of medical school. In her third year clinical rotations, she experienced some problems.

Ms. Lunde passed all of her third-year medical school exams, both written and oral. She received a passing grade in her first third-year clerkship, in orthopedics; one of the teachers who wrote an evaluation of her used the word "aggressive" in describing her.

Ms. Lunde received a "high pass" in pediatrics, but was given failing grades in courses in ob/gyn, neurology, and urology. An evaluator in the ob/gyn course used the word "aggressive" in describing Ms. Lunde.

The Promotions Committee ordered Karen Lunde to take a one-semester leave of absence from medical school. She was also directed to obtain a complete medical and psychological evaluation, was put on probation, and required to repeat her third-year clerkships, including courses in which she had already achieved passing grades.

Ms. Lunde went to the University of Iowa Counseling Center in order to schedule the counseling sessions that she had been required to undergo. She began counseling sessions with a psychologist employed by the University of Iowa, Dr. Margaret Koch. Ms. Lunde also took various tests, all of which showed her to be normal.

As a result of her sessions with the counselor, Ms. Lunde changed her

manner of dress, her hair style, began to wear makeup, and altered her personality in order to act as a submissive female. She then returned to medical school, repeating the course in ob/gyn and receiving a passing grade therein. She later testified, however, that the necessity to act feminine and submissive was an obstruction to her learning the medical material. According to her testimony, the difference in the ob/gyn clerkship between the first time she took it, resulting in a failing grade, and the second time she took it and received a passing grade, was "that focus on the femininity" the second time.

As mentioned above, Karen Lunde had already taken the third-year course in pediatrics and received a "high pass." The head of the pediatrics department

at that time, and his successor as head of the pediatrics department, both testified, two and a half years later, that Karen Lunde had fully satisfied the departmental requirements. It was the Promotions Committee, and not the pediatrics department, that required Ms. Lunde to repeat the course in pediatrics.

When she did so, the first three weeks of the pediatrics course were uneventful. At the end of the fourth week, she was given a letter by a faculty member that she had only for that week. Dr. Alfred Healy told her that he was going to give her a failing grade for his week. He gave Ms. Lunde a letter that included the following sentence:

"You have occasionally stated your

views in a manner and in a tone of voice that has caused me to question your motivation for the statement rather than to interact with you in a way that would assist in your learning the physiologic or psychological principle of patient care that was under discussion." [A copy of this letter, identified as Plaintiff Exhibit 4, is being filed as a lodging with the Clerk's office.]

Karen Lunde testified, two years following her dismissal from medical school, that the letter indicating Dr. Healy planned to give her a grade of unsatisfactory came as a total surprise to her. She also said Dr. Healy told her "that he was going to do his best ... to see that I didn't finish medical school . . ."

Ms. Lunde then said she went to the department head, who assured her "that it was impossible for a physician to blackball a student. . ." Nevertheless, the unsatisfactory grade submitted by Dr. Healy, along with a somewhat ambiguous grade submitted by one of Dr. Healy's subordinates, were admittedly the proximate cause of a grade of incomplete for pediatrics; the department head admitted that, but for this, Karen Lunde would have been given at least a passing grade at this point.

Anticipating a meeting of the Promotions Committee, Karen Lunde sought legal advice. At her request, her attorney wrote a letter, dated Nov. 5, 1988, to the Dean of the College of Medicine. That letter specifically

mentioned the possiblity that Ms. Lunde was the victim of sex discrimination. The letter also invoked Fourteenth Amendment due process and requested a hearing prior to any adverse action being taken against Ms. Lunde. Another copy of this same letter was sent to the Associate Dean of the medical school by certified mail on January 20, 1989; the delivery receipt shows that it was received January 23, 1989.

Another letter addressed to the Associate Dean and dated Feb. 6, 1989 mentioned Fourteenth Amendment equal protection.

On Feb. 15, 1989, suit was filed in U. S. District Court for the Southern District of Iowa, with Karen R. Lunde as Plaintiff, naming as Defend-

ants the College of Medicine, the University of Iowa, the Dean and Associate Dean of the College of Medicine, and the President and Registrar of the University of Iowa. The suit was brought, inter alia, under the First and Fourteenth Amendments of the U. S. Constitution, Title IX of the Education Amendments of 1972, specifically 20 U. S. Code Sec. 1681 (sex discrimination), and the Civil Rights Act of 1871, as amended, 42 U.S. Code Sec. 1983. This action is still pending; it was put under a stay of indefinite duration on August 31, 1989, and the stay has never been lifted. The Federal Court refused immediate injunctive relief, and on the following day, February 16, 1989, Karen R. Lunde's registration in the College of Medicine was ordered cancelled. Sub-

sequent to that action, Karen R. Lunde has pursued an appeal of the dismissal from medical school through State of Iowa administrative procedures; the decision by the Court of Appeals of Iowa, set forth in the Appendix herein, beginning at page A-2, is the final step in the Iowa administrative law process, basically as set forth in the Iowa Administrative Procedure Act, Chapter 17A, Code of Iowa.

The U. S. Supreme Court's decision in the case of Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) was brought to the attention of the respondent here, Iowa State Board of Regents, by letter dated May 31, 1988; this letter and its attachments constituted petitioner's State administrative appeal. The

petitioner has previously given notice that she has reserved her 42 U. S. Code Sec. 1983 case for disposition in the Federal forum, pursuant to England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

After the respondent State Board of Regents denied Karen R. Lunde's appeal, in 1989, she filed an appeal in the District Court of Iowa, in and for Polk County, which was given the file number AA 1583. She continued to claim that she should not have been dismissed from medical school without a "contested case" hearing pursuant to the Iowa Administrative Procedure Act. She claimed that since she had not received such a hearing, she had been denied Fourteenth Amendment due process.

Respondent argued that petitioner was not entitled to such a hearing, relying on the U. S. Supreme Court's decision in the case of Board of Curators of University of Missouri v. Horowitz, 435 U. S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978).

The Iowa District Court, under the Iowa APA, was supposed to review the record from the administrative agency. Here, however, there was no agency record for him to review. The Iowa District Court took the view that petitioner was not entitled to a contested case hearing. On the other hand, without a record, he could not decide the First Amendment and sex discrimination issues which petitioner had raised during the administrative agency appeals, which the agency had simply denied.

The District Court therefore decided that this was an "other agency action" case under the Iowa APA, and that the Court could hold an evidentiary hearing and complile a record as to petitioner's claims, **two years after her dismissal** from medical school. Petitioner filed an interlocutory appeal of this decision with the Supreme Court of Iowa. The Iowa Supreme Court refused to consider the interlocutory appeal, but ruled that petitioner could raise the same issues if there was an appeal of the Iowa District Court's decision following the hearing.

Thus it was that petitioner finally got to present her case during a six-day hearing before the Iowa District Court, Feb. 25 to Mar. 4, 1991, **two years after her Feb. 16, 1989 dismissal**

from medical school.

At the 1991 hearing before the District Court, petitioner went forward with her evidence in a trial-type hearing; the resulting record ran some 1800 pages, in four bound volumes. The District Court affirmed the respondent (A-50) and petitioner sought reconsideration; her request was overruled on April 30, 1991 (A-52 to A-54).

Petitioner then filed an appeal with the Supreme Court of Iowa. At the time she filed her appeal, petitioner also filed a motion, supported by affidavit, generally to the effect that she believed she was experiencing bias in the courts and asking that her case be assigned to a panel of judges who had no connection with the University of Iowa. Her motion was denied without

explanation. The Supreme Court of Iowa then transferred petitioner's case to the Court of Appeals of Iowa, which affirmed the District Court (A-2 to A-26, at A-26). Petititioner filed a request for rehearing, which was sumarily denied, on April 2, 1992 (A-55). Petitioner filed a petition for further review by the Supreme Court of Iowa; that was denied by Order dated May 28, 1992. (A-56).

Karen R. Lunde now seeks a Writ of Certiorari from the United States Supreme Court, to review the decision of the Court of Appeals of Iowa [A-2 to A-26 herein]. Petitioner asks that the judgment of the Court below be reversed, and that she be ordered restored to her position as a medical school student, from which she was illegally dismissed.

ARGUMENT

1. PETITIONER WAS DENIED FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION.

At the time she was dismissed from the University of Iowa College of Medicine, Karen R. Lunde had received passing grades in all of her first year classes, all of her second year classes, and all but one of her third year classes (a two-week clerkship in urology, in which she had scored at the "honors" level on the written exam, but had been given an "incomplete" in the course and directed to repeat the classwork; the repeat had been scheduled, but Ms. Lunde's registration was cancelled, and the medical school, therefore, barred her from removing the "incomplete").

Petitioner had a recognized liberty

interest in becoming a physician. She had completed approximately 3/4 of the medical school training needed for her M.D. degree at the time of her dismissal. She was legally entitled to a hearing prior to her dismissal. Fourteenth Amendment, U. S. Constitution; see Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Also, petitioner, at her hearing two years after the fact, introduced evidence in the form of letters from four other medical schools, to the effect that they would not consider her application to transfer unless she was in good standing at the University of Iowa; thus, it is clear that the dismissal from the College of Medicine imposed a stigma that prevented petitioner from continuing her

medical education at some other medical school. See Roth, 408 U.S. 564, at 573-574. Petitioner requested a hearing prior to any dismissal action by letter dated Nov. 5, 1988, well in advance of the Feb. 16, 1989 decision to dismiss her. Fourteenth Amendment due process was specifically invoked in that letter.

The Court of Appeals of Iowa mentioned, in a footnote, that it agreed with petitioner's contention that

> . . . once it is determined that due process applies, the question remains what process is due. Goss v. Lopez, 419 U.S. 565, 577, 95 S.Ct. 729, 738, 42 L.Ed.2d 725, 737 (1975) (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494

(1972)). . . .

The dispute over Fourteenth Amendment due process, in this case, thus does NOT involve any question as to whether or not petitioner was entitled to a due process hearing prior to her dismissal.

The inquiry, in this case, is: to what kind of hearing was petitioner entitled?

The Court of Appeals of Iowa decided that petitioner was only entitled to the type of hearing the petitioner got in the case of Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). The Court also decided that, in fact, petitioner had received that type of hearing. In both respects the Court erred, as will

be shown in the next section of this petition.

What petitioner asked for, was entitled to, and did not get, was a "contested case" hearing, pursuant to the provisions of the Iowa Administrative Procedure Act, Chapter 17A, Code of Iowa. This was governing state law, for Fourteenth Amendment purposes, in both due process and equal protection aspects.

The Iowa Legislature provided, in Sec. 17A.1(2) that the Iowa APA was

> . . . intended to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public. . . .

The Iowa Legislature also provided, in

the Iowa APA, for a number of different types of agency procedures, such as "rule-making", "licensing", "contested case", and a sort of catch-all category, "agency action", with all of these terms being defined in Sec. 17A.2 of the Iowa APA.

Section 17A.2, par. 2, defined a "contested case" as

> . . . a proceeding . . . in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency **after** an opportunity for an evidentiary hearing. [Emphasis supplied.]

The meaning of "contested case" had been authoritatively determined by the Supreme Court of Iowa, which had relied heavily upon two articles in

the Iowa Law Review by Professor Arthur Earl Bonfield. The articles both explained and analyzed the Iowa Administrative Procedure Act, which had been adopted in 1974 by the Iowa Legislature. One of these articles was particularly devoted to the "contested case." See "The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act," 63 Ia. Law Rev. 285-365 (1977).

The Supreme Court of Iowa said: "To be a contested case, the agency action must be one which determines the rights of specific individuals based on their own particular facts and circumstances." Citizens' Aide/ Ombudsman v. Rolfes, 454 N.W.2d 815, 817 (Iowa, 1990). This was not the first time the Supreme Court of Iowa

had defined "contested case" in this manner; see, e.g. Polk County v. Iowa State Appeal Board, 330 N.W.2d 267, 277 (Iowa, 1983), quoting Bonfield, 63 Ia. Law Rev. 285, at 294. Petitioner had a clear right, under governing State law, as authoritatively and repeatedly construed by the Supreme Court of Iowa, to a "contested case" hearing. As the Court of Appeals of Iowa here acknowledged,

> There is a significant difference between the procedural requirements for a "contested case" and "other agency action." A "contested case" requires a formal evidentiary adversarial hearing before the agency. "Other agency action" entitles the person affected to no more than an

informal hearing, **without the due process safeguards** inherent in an adversarial proceeding. [A-7, emphasis supplied.]

The proximate cause of petitioner's dismissal from medical school was the grade given by Dr. Healy in pediatrics the second time petitioner took the course. She had already received a passing grade in pediatrics (actually, a grade of "high pass") and thus already had been given credit for this course, having satisfied all departmental requirements. The grade given by Dr. Healy was obviously based, at least in part, on something that petitioner **said**, in class. Thus, there was, prima facie, a violation of petitioner's First Amendment rights. The Court of Appeals simply concluded that

"the first amendment issues . . . are without merit." [A-6] The Court of Appeals cited the District Court's conclusion that Dr. Healy's testimony had been that "petitioner's speech and conduct was disruptive of the academic process." See footnote 4, page A-6. But in fact, Dr. Healy had given no such testimony. Under cross-examination, Dr. Healy admitted that he did not even recall what petitioner had said. He did say that it was not loud. **He was specifically asked whether it was disruptive.** All he needed to do was say "yes." But he didn't; instead, he said "It did not facilitate the conference that I was trying to structure within the students." It was the District Court that said petitioner's speech and

conduct was disruptive; Dr. Healy DID NOT SO TESTIFY! Dr. Healy did specifically admit that he treated Karen Lunde differently than the other students; inasmuch as he was a State actor, this constituted a clear admission that petitioner's equal protection contention had a factual basis; the District Court ignored this, and similar admissions, and concluded there had been no denial of equal protection. [A-47.]

A major aspect of petitioner's equal protection showing was related to the fact that she had been required to take pediatrics a second time, whereas other students similarly situated had been required to take and pass the course only once. The District Court rejected this contention.

2. RESPONDENT, AND THE IOWA COURTS, MISINTERPRETED AND ERRONEOUSLY RELIED ON THE U. S. SUPREME COURT'S DECISION IN BOARD OF CURATORS OF UNIVERSITY OF MISSOURI V. HOROWITZ, 435 U. S. 73, 98 S.CT. 948, 55 L.ED.2D 124 (1978).

It is well-established that Fourteenth Amendment due process, and equal protection, are referenced to the laws of a particular state. In Horowitz, the reference was Missouri law; in the instant case, the reference is Iowa law.

To put it another way, the process that is due, in the instant case, is the process due petitioner under IOWA law. To the extent Horowitz is based on Missouri law, it is irrelevant to the instant case.

Since 1974, the State law governing in the administrative law area is

Chapter 17A, Code of Iowa, the Iowa Administrative Procedure Act. Horowitz did not involve the Iowa APA; thus, Horowitz is distinguishable from the instant case, and the Horowitz case is worthless as precedent when it comes to deciding what process was due petitioner under governing State law, to wit, under Iowa law.

Petitioner has insisted, from the beginning, that she had a right to a contested case hearing, with all of its attendant procedural safeguards, under Chapter 17A, Code of Iowa. This was the process due petitioner under Iowa law.

Respondent, on the other hand, has taken the position that the U.S. Supreme Court's decision in Horowitz decided, for all time, the question

of what process was due to a medical student as such.

Moreover, the due process hearing petitioner was entitled to, under governing State law, was a hearing **prior to her dismissal**. Sec. 17A.2, par. 2, Code of Iowa, provides for the evidentiary hearing in a contested case proceeding to come BEFORE the rights of the parties are determined, not afterwards in order to justify what was done. By no stretch of logic could a hearing TWO YEARS LATER satisfy Fourteenth Amendment due process requirements, based on the Iowa APA.

Nevertheless, the Iowa District Court here ruled that the instant case was in the "other agency action" category rather than the "contested case"

category, and he then proceeded with the evidentiary hearing that should have been held two years previously.

During the course of this belated hearing, petitioner called the chairman of the Promotions Committee, Dr. Dr. John H. Tinker. Dr. Tinker testified that he, and the members of his committee, had never seen the letter sent by petitioner's attorney which raised the issue of sexual discrimination and requested a hearing, pursuant to the Fourteenth Amendment, U. S. Constitution. Other documents were shown to Dr. Tinker that he also testified he, and members of the Promotions Committee, had not seen. Dr. Tinker specifically testified that the Promotions Committee was not aware of the fact that petitioner was asking for an

evidentiary hearing, the right to have a transcript made of the proceedings, the right to be represented by counsel, and the right to call witnesses. He also testified that he didn't believe the committee was aware of the allegations as to sexual discrimination.

Petitioner's counsel established that Dr. Tinker's committee had seen Dr. Healy's letter. Dr. Tinker was asked: "In considering the plaintiff's case, did your committee ever consider that the student's free speech rights might have been violated by Dr. Healy?" Dr. Tinker's answer to that question was: "We are in the habit in our committee of taking the comments made by the faculty, especially senior faculty, at their face value. I don't -- I wouldn't know how to interpret that

relative to her free speech rights."

Dean Helms admitted, in his testimony, that certain documents were not given to the Promotions Committee. These included the letter from petitioner's attorney that alleged petitioner might be the victim of sex discrimination. Asked why these documents were not furnished to the Promotions Committee, he testified that it was on advice of their (the medical school's) counsel.

Thus, petitioner established, by means of the testimony of medical school officials, that documents that were crucial to proper consideration of petitioner's case by the Promotions Committee had been deliberately withheld from the Promotions Committee. Even if the College of Med-

icine's procedure had been sufficient to comply with Horowitz, the substance had been corrupt. Furthermore, whatever hearing the petitioner in Horowitz received had not been two years late.

One other distinction with respect to Horowitz should be mentioned. The Horowitz case involved an academic dismissal. Respondent has tried to portray the instant case an an academic dismissal case in order to bring it within Horowitz. However, it is clear that the instant case is **not** an academic dismissal case; it is, instead, a mixed-motives civil rights case that heavily involves petitioner's personality and behavior. Thus, the Horowitz case is not in point, and the decision by the Court of Appeals of Iowa is

clearly erroneous. The Court of Appeals cited, and quoted from, the case of Hollinrake v. Law Enforcement Academy, 452 N.W.2d 598 (Iowa, 1990. See A-8. Quoting Hollinrake, "When a decision is based solely on legislative facts, due process does not require a hearing . . . ." 452 N.W.2d, at 602. In Hollinrake, the fact in question was a standardized vision requirement, a "generalized legislative fact." The instant case involves "adjudicative facts" which, in the words of the Hollinrake case, "are individualized facts concerning the circumstances of the specific party--the facts of the particular case." Here, there were material issues of fact in dispute, and a contested case hearing was required.

3. THE IOWA COURTS ERRED IN REFUSING TO APPLY THE BURDEN-SHIFTING MECHANISM USED IN CIVIL RIGHTS CASES TO A MIXED-MOTIVES CASE INVOLVING THE DISMISSAL OF A THIRD-YEAR STUDENT FROM A MEDICAL SCHOOL RECEIVING FEDERAL FUNDS, WHERE BOTH FIRST AMENDMENT AND TITLE IX SEX DISCRIMINATION ISSUES WERE INVOLVED.

As previously noted, applicable State (Iowa) due process, the Iowa Administrative Procedure Act, Chapter 17A, provided for petitioner to receive a "contested case" hearing prior to her dismissal from the University of Iowa College of Medicine. Applicable University of Iowa administrative regulations, adopted pursuant to the Iowa APA, specifically provided for the use of "contested case" procedures in various types of cases involving the Uni-

versity of Iowa. These regulations were set forth in the Iowa Administrative Code under the general heading Regents Board[681], with Chapter 12 being University of Iowa Procedures.

Prior to the adoption of the Iowa APA, the various colleges in the University of Iowa each had their own procedures for dealing with various kinds of problems involving students. With the advent of the APA, all of these procedures, such as those the College of Medicine had long been using, were rendered obsolete; students were now entitled to full-blown evidentiary hearings, using the "contested case" procedures of the APA.

However, Section 17A.10 of the Iowa APA provided for Informal Settlements, and agencies were directed to prescribe

by rule specific procedures for attempting such informal settlements. Sec. 17A.10, par. 1, contained the following admonition:

> This subsection shall not be construed to require either party to such a controversy to utilize the informal procedures or to settle the controversy pursuant to those informal procedures.

Petitioner's administrative case obviously involved the "academic status or standing of a student," as set forth in the Iowa Administrative Code, 681-12.5(7)(e). However, according to Sec. 17A.10, Code of Iowa, par. 1, quoted above, the College of Medicine could make use of the informal procedures set forth in the College of Med-

icine Student Handbook if, but only if, petitioner waived her "contested case" hearing rights under the Iowa APA, which she did not do. Furthermore, the College of Medicine never asked petitioner to waive her "contested case" hearing rights; instead, the College of Medicine, contrary to the admonition quoted above, has taken the position that the only procedures petitioner had for resolving her dispute with the medical school are those in the Student Handbook, and that those procedures are legally sufficient under the Horowitz case.

Similarly, the administrators at the College of Medicine, as shown by the testimony quoted under section 2, above, deliberately withheld from the Promotions Committee documents

that would have shown the committee that petitioner was alleging that she was the victim of sex discrimination. And by keeping petitioner's legal counsel out of the proceedings, the Promotions Committee also kept out anything counsel could have presented with respect to the First Amendment violation.

Until the hearing held in Iowa District Court two years after her dismissal from medical school, petitioner had never been able to present any evidence concerning sex discrimination, and her contentions with respect to violation of her First Amendment rights, based upon the letter Dr. Healy had written, were simply ignored, even though the letter itself was part of her record in the medical school.

When the hearing in the Iowa District Court took place in February and March of 1991, two years after petitioner's dismissal from medical school, counsel for petitioner made it very clear to the Court that he would begin by establishing a prima facie case as to sexual discrimination, and as to the First Amendment violation, using the mixed-motives civil rights case method of proof, based especially upon the following U. S. Supreme Court decisions: McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d (1989); and Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

Petitioner furnished the Court with

a Trial Brief prior to the commencement of the hearing, informing the Court on exactly what proof would be presented to establish the various elements of the prima facie case. During the course of the hearing, petitioner furnished the Court with a Trial Memorandum of 3/4/91; the latter carefully explained the elements of the prima facie case and how each element had by then been established. In her Trial Memorandum, at pp. 10-11 thereof, petitioner stated to the Court:

> In summary, Plaintiff has gone far beyond what she was required to do to make out a prima facie case. Thus, while Plaintiff will continue with a presentation of additional evidence from additional witnesses, it is apparent that Defendant-Res-

pondent now has the burden of proof, as will be discussed in the following section of this Memorandum.

The District Court, at pages 18-20 of this Trial Memorandum, was shown **twelve** examples of illegal sexual stereotyping, identifying and quoting the relevant language from all twelve. In addition, petitioner drew the Court's attention to many instances in which the petitioner had been described as **"aggressive"** in evaluations of her performance. Petitioner told the Court that

> All evaluations which used the word "aggressive" to describe Plaintiff's behavior are prima facie illegal. In the words of Justice Brennan:
>
> > In the specific context of sex stereotyping, an employer who

> acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. [Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 1790-1791, 104 L.Ed.2d 268 (1989).]

The District Court found, as a fact, that "There are a significant number of such comments [references to petitioner as "aggressive"] in the evaluations." See Findings of Fact, Conclusions of Law and Order, A-27 to A-51, at A-40 herein.

The Court also quoted the paragraph quoted above from Justice Brennan's opinion in Price Waterhouse, supra. [A-40 to A-41]. The Court further stated:

> The Court assumes for purposes of its decision that the Price

> Waterhouse analysis applies to the University of Iowa College of Medicine, and its treatment of students, although the situation is obviously not an employer-employee situation. [A-41].

The District Court then stated that

> The **legal standard** to be applied to petitioner's claims of discrimination on the basis of sex, violation of her rights to freedom of speech, and denial of equal protection **is not clear.** [A-42, emphasis supplied.]

Incredibly, however, the Court went on to conclude that,

> Based upon its view of the evidence in this case, the Court concludes that it makes no difference what analysis is used in making

> its determination. In any event, petitioner's dismissal from medical school must be upheld. [A-42].

Essentially, the view taken of the evidence by the District Court would mean that no medical student, under any circumstances, could prove either that her right to be free from sexual discrimination had been violated, or that her First Amendment rights had been violated. The error is clear.

The Court also imposed an additional element of proof petitioner would have to meet that is not supported by the case law:

> While there is certainly evidence that critical comments were made concerning petitioner's dress and aggressiveness, there is no evidence to support the proposition

> that a different standard was applied to male and female students. [A-43].

The foregoing is clearly erroneous. A civil rights petitioner is not required to show that a different standard was applied to males and females; the requirement in a mixed-motives dismissal case is to show that the particular characteristic (sex, race, etc.) played a part in the dismissal, with the burden then shifting to the respondent to show that the same decision would have been made anyway.

The District Court also erred in the legal standard it finally applied. Although the Court had said that "it makes no difference what analysis is used," [A-42], the Court went on to use a "substantial evidence" standard. [A-48].

On appeal, the Court of Appeals of Iowa affirmed the District Court. With reference to sex discrimination, the Court of Appeals said:

> It found gender discrimination played no role in her dismissal from medical school. [A-14].

With reference to the First Amendment violation, the Court of Appeals said:

> We determine the other issues, including the first-amendment issues, raised by Karen R. Lunde in her brief are without merit. [A-6].

Petitioner takes the position that the Court of Appeals of Iowa erred in simply concluding she had no case, despite a six-day hearing and an 1800 page record.

With reference to the First Amendment

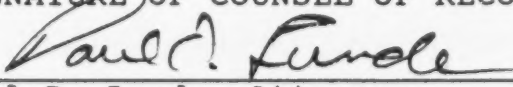
violation, petitioner met her burden of proof by showing that the violation of her First Amendment rights occurred. She did not simply assert the First Amendment issue in her brief; instead, she presented a prima facie case and was entitled to have the burden of proof shift to respondent, who had the duty to prove by a preponderance of the evidence that her dismissal from medical school would have taken place anyway.

With reference to sex discrimination, in the form of sexual stereotyping, petitioner in nearly six days of testimony and in dozens of exhibits made out a prima facie case, and again, was entitled to have the burden of proof shift to respondent, to prove that petitioner's dismissal from medical school would have taken place

anyway.

Petitioner urges this Court to grant Certiorari and look at the record in this case. It will be immediately apparent that the decision below is inconsistent with this Court's civil rights decisions, particularly its decision in Price Waterhouse v. Hopkins, supra, and its decisions with respect to the First Amendment. Here, petitioner was actually dismissed from medical school **for something she said in a class** that was not loud or otherwise disruptive, but simply "inappropriate" in the view of the teacher.

SIGNATURE OF COUNSEL OF RECORD



Paul D. Lunde, Attorney,

a Member of the Bar of this Court.

APPENDIX

IN THE COURT OF APPEALS OF IOWA

No. 1-634 / 91-760

KAREN R. LUNDE,

Appellant,

vs.

IOWA BOARD OF REGENTS,

Appellee.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Karen R. Lunde challenges a district court decision upholding her dismissal from University of Iowa's College of Medicine. AFFIRMED.

Paul D. Lunde, Ames, for appellant.

Bonnie J. Campbell, Attorney General, Gordon E. Allen, Deputy Attorney General, and John M. Parmeter, Special Assistant Attorney General, for appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HABHAB, J.

In 1987, during her third year of medical school at the University of Iowa, Karen R. Lunde received unsatisfactory reviews in three clinical rotations: neurology, urology, and obstetrics-gynecology. The School of Medicine (medical school)[3] placed her on academic probation on January 18, 1988. While on probation, she received an incomplete after six weeks in a pediatric clerkship. She later repeated two weeks of that clerkship.

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[3]. Although the Iowa Board of Regents is the named party in this action, several levels of administration have been involved at various times. For the sake of simplicity, we refer to the Board and others included as appellees as the "medical school."

Karen R. Lunde's academic progress was reviewed by the Committee on Student Promotions in several meetings at which she appeared and made statements. The Promotions Committee recommended cancellation of her registration in the medical school. The matter was reviewed by the Medical Council and Executive Committee which canceled her medical school registration. The Assistant Dean of Academic Affairs affirmed the dismissal. The Board of Regents upheld the decision of the College of Medicine.

In all stages of these proceedings the University and Board of Regents declined to use contested case procedures as advocated by Karen R. Lunde's attorney. Rather, the dismissal was conducted following the

informal "meet and confer" procedures set out in the medical school's student handbook.

She appealed to the district court which affirmed the dismissal. The court believed that she was not entitled to contested case proceedings before the University. It rejected her claim of discrimination on the basis of sex, violation of her rights to freedom of speech, and equal protection. The court concluded that only valid academic criteria were applied in her dismissal. She has appealed. We affirm.

I. Issues.

After reviewing the briefs by the parties, we are convinced there are two main issues properly before this court. The first and preliminary issue is whether Karen R. Lunde was entitled to con-

tested case proceedings prior to her dismissal. The second is whether from the evidence we should uphold the medical school's dismissal of her for academic reasons. We determine the other issues, including the first-amendment issues, raised by Karen R. Lunde in her brief are without merit.[4]

II. Contested Case.

The trial court ruled this action was not a "contested case" as defined

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[4]. We agree with the trial court's finding that appellant's argument that she was dismissed from the medical school as a consequence of exercising her rights to freedom of speech is without factual basis. As the trial court found: "There is simply no question that petitioner's difficulties stemmed not from, for example, expressing political views or stating medical opinions contrary to her professors'. Rather, as was apparent from the testimony of Dr. Healy, the problems arose because petitioner's speech and conduct was disruptive of the academic process."

by Iowa Code 17A.2(2). Rather, it held the present case was "other agency action." We set out the pertinent code section.

> "Contested case" means a proceeding including but not restricted to rulemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing.

Iowa Code section 17A.2(2).

There is a significant difference between the procedural requirements for a "contested case" and "other agency action." A "contested case" requires a formal evidentiary adversarial hearing before the agency. "Other agency action" entitles the person affected to no more than an informal hearing, without the due process safeguards inherent in an adversarial proceeding.

See Hollinrake v. Law Enforcement Academy, 452 N.W.2d 598, 601-602 (Iowa 1990); see also Bonfield, The Definition of Formal Agency Action Under the Iowa Administrative Procedure Act, 63 Iowa L. Review 285 (1977). The contested case requirement is premised on procedural due process considerations. Hollinrake, 452 N.W.2d at 602. "When a decision is based solely on legislative facts, due process does not require a hearing . . . ." Id. (emphasis added).

The United States Supreme Court, in Board of Curators v. Horowitz, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978), considered the procedural due process issue in a case similar to the one presently before us. In that case, as in this one, a female medical student was

dismissed for inability to successfully complete the clinical rotations to the satisfaction of her medical professors. Id. at 81-82, 98 S.Ct. at 950-951, 55 L.Ed.2d at 129-130.

The student in Horowitz attacked her dismissal on the grounds of the due process clasue of the fourteenth amendment. Id. at 79-80, 98 S.Ct. at 949-950, 55 L.Ed.2d at 128-129. She claimed she was denied procedural due process by the medical school's failure to afford her a formal evidential hearing, similar to that requested by Karen R. Lunde here. Id. at 79-80, 98 S.Ct. at 950, 55 L.Ed.2d at 128. The student's challenge was based, at least in part, on equal protection issues, including

gender discrimination.[5] See Id. at 92 n.7, 98 S.Ct. at 956, 55 L.Ed.2d at 136 ("Respondent alleges that the school applied more stringent standards in evaluating her performance than that of other students because of her sex, religion, and physical appearance."). The Supreme Court held the female student's due process rights were not vio-

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[5]. The appellant takes issue with medical school's claim that her dismissal was for academic reasons. Rather she claims it was due, at least in part, to illegal sex discrimination in the form of illegal sexual stereotyping of the type involved in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1175, 104 L.Ed.2d 268 (1989). The district court, however, found to the contrary. In doing so, it determined there was no evidence that appellant was in any manner evaluated different from other students because of her sex. With regard to appellant's physical appearance, this in and of itself did not cause her to be evaluated any differently than any of the other students. We agree with this finding.

lated. Id. at 84-90, 98 S.Ct. at 952-55, 55 L.Ed.2d at 131-35.

Although Horowitz was decided on constitutional due process grounds, both the facts and its rationale apply in the present case. The student in Horowitz was seeking a formal adversarial hearing before the medical school board. Id. at 79-90, 98 S.Ct. at 949-55, 55 L.Ed.2d 128-35. Likewise, Karen R. Lunde is seeking a contested case proceeding here. A contested case would involve an adversarial hearing with presentation of evidence and cross-examination of witnesses, with idential due process considerations. In Horowitz, the student was granted other remedial measures in order to improve her clinical standing. Id. at 81-86, 98 S.Ct. at 950-53, 55 L.Ed.2d at 129-32. She

was allowed to appeal her dismissal to the university administration. Id. at 82, 98 S.Ct. at 951, 55 L.Ed.2d at 130.

The female medical student in Horowitz likewise indicated sexually discriminatory reasons played a role in her dismissal. Id. at 92 n.7, 98 S.Ct. at 956, 55 L.Ed.2d at 128. The Supreme Court ruled in Horowitz that these various remedial measures (and opportunities to appeal) "went beyond constitutionally required procedural due process . . . ." Id. at 85, 98 S.Ct. at 952, 55 L.Ed.2d at 132 (emphasis added).

Karen R. Lunde's insistence upon her entitlement to contested case proceedings is analogous to the procedural due process claim advanced in Horowitz. She had notice of the profess-

ors' dissatisfaction with her clinical rotations. She was given the opportunity to remedy the situation. She appealed her dismissal. In fact, she was afforded even more due process than the student in Horowitz, as she was allowed to appear before the deciding agency and present a statement and exhibits on her own behalf.

She subsequently was afforded a full adversarial trial in district court. The court exercised its authority pursuant to rule 17A.19(7) in ordering the taking of new evidence. Extensive evidence was taken. The record itself is voluminous. The appendix submitted with the case alone is 1800 pages in three bound volumes. She was afforded a full and fair opportunity to confront and cross-examine witnesses. She was all-

owed to present evidence, including medical school records and data. Apparently she took full advantage of this opportunity.[6]

The trial court determined, after taking this voluminous evidence and viewing the witnesses presented, that Karen R. Lunde had been dismissed solely for academic reasons. It found gender discrimination played no role in her dismissal from medical school. We determine, as did the United States Supreme Court in Horowitz, Karen R. Lunde has been afforded the required procedural due process in the present

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[6]. We recognize appellant's argument that she did not "accept the hearing . . . as the equivalent of or in substitution of the contested case hearing" she claims she is entitled to. Nonetheless, the hearing was held, the appellant participated and was afforded the opportunity to make her record.

case.[7] We agree with the trial court that she is not entitled to contested case proceedings.

The appellant, in passing, contends she "was illegally and without due process deprived of a recognized liberty interest." Like in Horowitz, we need not decide whether appellant's dismissal deprived her of a liberty interest in pursuing a medical car-

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[7]. We agree, of course, with appellant that once it is determined that due process applies, the question remains what process is due. Goss v. Lopez, 419 U.S. 565, 577, 95 S.Ct. 729, 738, 42 L.Ed.2d 725, 737 (1975) (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972)). We also agree that in the analysis of the problem at hand section 17A.1(2) and the subsequent sections of that chapter must be considered. But when those sections are considered in light of the holding in Horowitz, we reach the conclusion that appellant did receive the process due her.

eer nor need we decide whether appellant's dismissal infringed any other interest constitutionally protected against deprivation without procedural due process. Even if we assumed the existence of a liberty or property interest, appellant, like in Horowitz, has been afforded at least as much due process as the fourteenth amendment requires. She was fully informed of the faculty's dissatisfaction with her progress. The ultimate decision to dismiss was careful and deliberate. She was afforded an extensive hearing before the district court. In reaching this result, we do not agree with the appellant that our holding in this respect is contrary to our supreme court's decision in Citizens' Aide/Ombudsman v. Rolfes, 454 N.W.2d

815 (Iowa 1990).

III. Academic Dismissal.

Turning to the issue of academic dismissal, the United States Supreme Court in Horowitz noted: "The educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students 'one in which the teacher must occupy many roles--educator, adviser, friend, and, at times, parent-substitute.'" Horowitz, 435 U.S. at 90, 98 S.Ct. at 955, 55 L.Ed.2d at 135 (quoting Goss v. Lopez, 419 U.S. at 594, 95 S.Ct. at 746, 42 L.Ed.2d at 746). In that case, it is further noted that "whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural

tools of judicial or administrative decision making." Id.

In the case at bar, the record reveals Karen R. Lunde had been experiencing problems in medical school since her first year. She is obviously a bright young woman. She attended school in Ames and Ankeny, Iowa, and graduated from Ankeny High School in the top three percent of her class. She was sixteen years old at the time of graduation. Immediately after graduation, she enrolled in biomedical engineering and graduated from the University of Iowa College of Engineering in May 1985 with honors (highest distinction) and a 3.87 grade average (out of a 4 point possibility).

She entered the College of Medicine in August of 1985. During her first year and subsequent years, problems sur-

faced regarding her ability to relate with others, inappropriate behavior, falling asleep in classes, and apparent inability to correctly synthesize information and separate the relevant from the irrelevant. It was suggested at the end of her first year of medical school that she take a leave of absence in order to achieve some personal stability. Her mother immediately objected to the taking of such a leave. She therefore continued her studies at medical school and continued to have problems with other students and the faculty. Her episodes of sleeping in class also continued.

It was during the third year of medical school that her problems were brought to a head. She experienced problems with her clinical professors and

apparently other residents and students on her third-year clinical rotations. Many of these professors reported she was aggressive and inappropriate in her relations with other medical health professionals. She also apparently continued to have problems synthesizing information and winnowing extraneous material. Her inability to operate in a clinical setting resulted in her failing several rotations. She was subsequently put on academic probation. She was allowed to retake her clinical rotations in an effort to afford her an opportunity to pass them. She once again failed some of her rotations.

At this juncture, the medical school decided to dismiss her from medical school for academic reasons. The Board of Regents concurred on appeal. She then

appealed this case to the district court. The district court affirmed the medical school's decision.

The United States Supreme Court addressed almost the identical issue in Horowitz. The Supreme Court declared the ability to function in a clinical setting, including interaction with other health professionals, was an appropriate academic consideration. Id. at 89-90, 98 S.Ct. at 955, 55 L.Ed.2d at 135. It declared the academic professionals in clinical rotations were uniquely qualified to decide a medical student's academic standing. Id.

> The decision to dismiss respondent ... rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective

> and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires as [sic] expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making.
>
> Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing. ... We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship. We recognize, as did the Massacusetts Supreme Judicial Court over 60 years ago, that a hearing may be "useless or harmful in finding out the truth as to scholarship." Barnard v. Inhabitants of Shelburne, 216 Mass, at 23, 102 NE, at 1097.

Horowitz, 435 U.S. at 90, 98 S.Ct. at 955, 55 L.Ed.2d at 135.

In a later case the Supreme Court once again refused to interfere in a

medical school's academic dismissal of a student. Regents of University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985). In that case, the Court wrote:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. Cf. Youngberg v. Romeo, 457 U.S. 307, 323, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).
>
> Considerations of profound importance counsel restrained judicial review of the substance of academic decisions. ...

Ewing, 474 U.S. at 225, 106 S.Ct. at 513, 88 L.Ed.2d at 532 (quoted with approval in North v. State, 400 N.W.2d 566, 569 (Iowa 1987)).

In a footnote in Ewing, the Supreme

Court went on to say:

> Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision making by the academy itself. Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of "the four essential freedoms" of a university.

Id. at 226 n.12, 106 S.Ct. at 513, 88 L. Ed.2d at 533 (citations omitted). We note the Iowa Supreme Court has adopted the stance of the United States Supreme Court concerning academic dismissals. See North, 400 N.W.2d at 569.

We, too, are reluctant to override the faculty's academic decision in the absence of significant evidence showing a failure to exercise their professional judgment. Their evaluation of Karen R. Lunde's ability to perform on her clinical rotations was clearly within their

professional purview. Given the clear import of Horowitz and the evidence in this case concerning the inappropriateness of Karen R. Lunde's behavior and her inability to interact with other health professionals on her clinical rotations, we affirm her dismissal by the medical school for academic reasons.

IV. Conclusion.

We determine the agency and trial court did not err in refusing to grant contested case status pursuant to Iowa Code chapter 17A. We determine Karen R. Lunde was granted more than adequate due process. We affirm the medical school's decision dismissing her for academic reasons. We are unable to find that its action was unreasonable, arbitrary, or capricious, nor can it be characterized as an abuse of discretion or

as a clearly unwarranted exercise of discretion.

As the United States Supreme Court stated in Horowitz, "courts are particularly ill-equipped to evaluate academic performance." The factors discussed by us in the preceding pages with respect to procedural due process speak "a fortiori here and warn against any such judicial intrusion into academic decisionmaking." Id. We determine any other issues the parties may have raised are either covered by this opinion or are without merit. Costs of this appeal are taxed to Karen R. Lunde.

AFFIRMED.

IN THE DISTRICT COURT OF IOWA IN AND FOR POLK COUNTY

KAREN R. LUNDE, Petitioner, v. STATE BOARD OF REGENTS, Respondent.	:	CASE NO. AA 1583 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 25, 1991, the above-captioned matter came on for trial to the Court. Petitioner appeared in person and by her attorney, Paul D. Lunde. Respondent appeared by its attorney, John M. Parmeter. Trial continued through March 4, 1991; the parties were given until March 22, 1991 to submit any post-trial briefs or arguments which they wished the Court to consider. The matter was deemed submitted on

March 22, 1991. After hearing the testimony of the witnesses, reviewing the exhibits admitted into evidence and the court file (including the post-trial briefs), and being fully advised in the premises, the Court now enters the following ruling.

Petitioner filed this action in pursuit of her appeal of her dismissal from the University of Iowa Medical School in 1989. Petitioner has raised several claims in contesting her dismissal. First, she alleges that she was improperly denied contested case treatment in proceedings below, from the actions of the Student Promotions Committee through the Board of Regents' denial of her appeal. Respondent agrees that petitioner's challenge to her dismissal was not treated as a contested case, but argues that petit-

ioner was not entitled to contested case treatment. This Court has previously ruled, on September 12, 1990, that petitioner was not entitled to proceedings below as a contested case. However, this Court further ruled that because it viewed this proceeding as one involving "other agency action," petitioner would be allowed to make a full factual record at the time of the February 25, 1991 hearing concerning all of her claims.

Aside from her claim that she was entitled to contested case treatment, petitioner argues that her dismissal from the medical school was improper because the reasons stated were without factual basis, and because in fact her dismissal was caused by petitioner's exercise of her rights to freedom of speech and by discrimination on the

basis of sex. Petitioner further contends that she was denied equal protection because no other medical students in her class, having passed all the courses required for third-year students, were dismissed from the medical school despite the passing performance. Petitioner has asked the Court to set aside her dismissal, reinstate her to the medical school, and for further relief, all in the context of this action.

Karen Lunde was began [sic] as a student to [sic] the University of Iowa College of Medicine in the fall of 1985. Prior to that time, she had an excellent academic and personal background. She had graduated from the University of Iowa undergraduate program in the spring of 1985 with a degree in biomedical en-

gineering with highest distinction. Petitioner was one of the youngest, if not the youngest, members of her medical school class, having in effect skipped two years of school between kindergarten and 12th grade.

During her first two years of medical school, Karen received passing grades in all of her courses. However, her passage through these two years was not unremarkable to the faculty. Various professors brought petitioner to the attention of Associate Dean Aschenbrener because of problems the professors perceived Karen had in interacting with her peers, and because of grades they viewed as only marginally passing. At one point Dean Aschenbrener suggested the possibility of a leave of absence for Karen, in order for her to work on developing her

interactional skills. However, Karen's mother strenuously objected to such a leave, and Karen proceeded to her second year of medical school.

During her second year, Karen once again came to the attention of Dean Aschenbrener because it was noted that she was frequently sleeping in classes. Indeed, petitioner underwent a sleep disorder evaluation as a result of faculty concerns, but no physical cause for Karen's sleeping in class was identified. There was continued concern about Karen's ability to interact with others. During both the first and second years of medical school, concerns were raised by faculty members as to grades they viewed as only marginally passing. Nevertheless, Karen began her third year of medical school.

The third and fourth years of medical school are significantly different from the first two years in that the students spend all of their time on clincal rotations. While the students still take written examinations at the end of each rotation, the grades they receive are no longer simply based upon the objective results of the written examinations but are also based in large part upon the subjective evaluations made by the professors and residents with whom the student comes in contact during the rotation. The medical student takes the courses in no particular order, varying from student to student, but is involved in only one subject at a time. Except for the course entitled Introduction to Clinical Medicine taken during the second

semester of the second year, the program for third and fourth year medical students is quite different than their prior experience in medical school.

Upon beginning her third year, petitioner almost immediately ran into difficulty, receiving a marginal pass in her first rotation (orthopedic surgery). While petitioner disputes the ability of the medical school to consider the "marginal pass," arguing that the final grade is only "pass" or "fail," it is clear that the faculty, and specifically the Student Promotions Committee, is entitled to look at a student's entire academic record in determining whether the student should advance and eventually receive her degree. See, e.g., Nichols v. McDonald, 751 F.

Supp. 811, 813 (S.D. Iowa 1990).

Petitioner later failed the obstetrics and gynecology, urology and neurology rotations. In each case, the problem was not with the written examinations in the courses, in which petitioner continued to do well. Rather, the concerns raised regarding petitioner by her professors and the residents with whom she dealt related to more subjective areas. Specifically, problems were noted of (1) loud and sometimes inappropriate remarks in the clinical setting, (2) inappropriate behavior; (3) talking and reprimanding herself out loud; (4) difficulty prioritizing patient-clinical concerns; (5) difficulty approaching patients with difficult problems; (6) difficulty distinguishing relevant from irrelevant clinical infor-

mation in synthesizing the patient's history; (7) repeatedly falling asleep; and (8) difficulty in relating verbally to peers and staff.

As a result of the foregoing concerns, Karen was brought before the Committee on Student Promotions for a complete review of her medical school performance. As a result of that review, the Committee recommended that petitioner not be registered in the College of Medicine during the spring 1988 semester. The Committee further recommended that Karen provide the Committee with a current medical evaluation for the sleep disorder, and that she continue with counseling. The Medical Council, which is the body empowered to enforce requirements for students to remain in good standing,

approved the recommendation that Karen should not be registered in the spring 1988 semester, and that she provide a current medical and psychiatric evaluation. Karen did in fact then leave school for one semester, and pursuant to school policy re-commenced here [sic] M3 year in June, 1988.

During the interim, petitioner underwent counseling with Margaret Koch. Her recollection of the events surrounding counseling is that Ms. Koch advised her to dress and act more femininely in the future to avoid criticism by medical school faculty members. Petitioner testified that when she first returned to medical school she followed this advice and consequently passed the clinical obstetrics and gynecology rotation, which she had failed the first time.

Karen attributes her pass the second time solely to the fact she was dressing and acting more femininely. She further testified, however, that she was unable to continue with the "act" of being so feminine, as it was not really her personality. Karen asserts that once she reverted to less feminine behavior and dress, she began to have problems once again.

The Student Promotions Committee reviewed the academic performance of petitioner on August 23, 1988; November 9, 1988; December 22, 1988 and January 11, 1989. Following the meeting of January 11, 1989, the Committee recommended the cancellation of petitioner's registration. After some concern was raised concerning whether the petitioner had received adequate notice

of the January, 1989 Committee meeting, petitioner was allowed to appear before the Committee on February 13, 1989. The Committee continued with its earlier recommendation, which was adopted by the Medical Council on February 16, 1989. This appeal then followed, winding its way through the Medical Council, the Executive Committee, the Vice-President of Academic Affairs, and ultimately to the State Board of Regents. Petitioner is now challenging the decision of the Board of Regents.

As set forth above, Karen's concerns about the counsel she believes she received from Ms. Koch to dress and act more femininely, and the consequent effects of her perceived following and then disregard [sic] of Ms. Koch's advice form a significant part of petit-

ioner's claim of sexual discrimination. In further support of her claim, petitioner points to references in her evaluations to her being "aggressive", as well as to comments concerning petitioner's dress. There are a significant number of such comments in the evaluations.

Plaintiff cites Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) in support of her position that she has been the victim of discrimination on the basis of sex, as evidenced by the use of the descriptive term "aggressive." Specifically, petitioner argues that she has been the victim of sex stereotyping, and apparently refers to the following language in Price Waterhouse:

> In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a

> woman cannot be aggressive or that she must not be, has acted on the basis of gender. ... An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch 22: out of a job if they behave aggressively and out of job [sic] if they don't. Title VII lifts women out of this bind. Price Waterhouse, 109 S.Ct. at 1790-91.

The Court assumes for purposes of its decision that the Price Waterhouse analysis applies to the University of Iowa College of Medicine, and its treatment of students, although the situation is obviously not an employer-employee situation.

The legal standard to be applied to petitioner's claims of discrimination on the basis of sex, violation of her rights to freedom of speech, and denial of equal protection is not clear. Respondent argues that the Court should

apply the traditional analysis used in administrative appeal cases and simply decide whether there is substantial evidence to support petitioner's dismissal from medical school. However, petitioner urges the Court to apply traditional civil rights analysis, such as that set forth in Price Waterhouse, especially since petitioner argues that she was denied the opportunity to make a full factual record below concerning her claims of sex discrimination, denial of freedom of speech, and denial of equal protection. Based upon its view of the evidence in this case, the Court concludes that it makes no difference what analysis is used in making its determination. In any event, petitioner's dismissal from medical school must be upheld.

The problem with petitioner's claims

of discrimination on the basis of sex is not the legal basis for her claims, but the factual basis. While there is certainly evidence that critical comments were made concerning petitioner's dress and aggressiveness, there is no evidence to support the proposition that a different standard was applied to male and female students, in that aggressiveness was encouraged in male students but not in female students. From all the evidence adduced at trial, it is clear that doctors of all kinds, regardless of race, sex or other criteria, are expected to be aggressive in caring for their patients and treating their medical problems. However, they are also expected to be professional in their dealings with patients, staff and peers. It is clear to the Court that the context of comments

in the evaluations concerning petitioner's aggressiveness were made in the sense of professionalism, that is that petitioner was failing to act in a manner appropriate to any and all physicians. Such a criterion is not only not improper, but is laudable and certainly a legitimate goal for the medical school faculty to seek in its graduates.

Petitioner's argument that she was dismissed from the medical school as a consequence of exercising her rights to freedom of speech is also without factual basis. There is simply no question that petitioner's difficulties stemmed not from, for example, expressing political views or stating medical opinions contrary to her professors. Rather, as was apparent from the testimony of Dr. Healy, the problems arose because pet-

itioner's speech and conduct was disruptive of the academic process. The Court must note that petitioner's conduct during the course of the six-day trial was further evidence in support of respondent's view of the facts underlying the present dispute. There were several instances during the proceedings, even during the testimony of other witnesses, when petitioner was loud and disruptive of the court proceedings. The point is not that the Court was offended by such conduct, or considered it contemptuous, but rather that the conduct was inappropriate for someone of petitioner's age, experience and desired profession.

Respondent correctly points out that while students enjoy the right of freedom of speech, that right is not unlim-

ited. Tinker v. Des Moines Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, 738 (1969). The Court concludes that in this case the College of Medicine in no way inappropriately acted against petitioner as a consequence of exercising free speech rights. Once again, the sole purpose of the comments made and actions taken by the medical school was to matriculate a first class medical professional person, who could deal with patients, staff and peers in an appropriate manner.

Petitioner's final argument is that she was denied equal protection because she was the only person in her class who "passed" all of her M3 classes and yet was not permitted to proceed on to the M4 year. The Court has substantial question as to whether the class petit-

ioner alleges, namely those medical students who were to graduate in 1989 and 1990, is the appropriate class to consider; petitioner's classification appears unduly restrictive. However, the Court concludes that no denial of equal protection has occurred in any event.

It is clear from the record evidence that the Student Promotions Committee is vested with great authority and discretion in determining whether a student should advance to the next level within the medical school and ultimately to graduate. Certainly, that authority is not unlimited, as it is subject to review by the Medical Council in every instance and also to appeal process as has occurred here. Nevertheless, the Student Promotions Committee must have such authority and

discretion if the University of Iowa College of Medicine is to be an effective academic institution. See Nichols v. McDonald, 751 F.Supp. 811, 814-15 (S.D. Iowa 1990).

Here the Student Promotions Committee was faced with a number of concerns regarding petitioner, which were valid concerns as set forth above. These concerns existed regardless of the fact that petitioner had received a grade of "pass" in each of her M3 courses. There was and is substantial evidence to support the conclusion of the Student Promotions Committee, and the affirmation of that conclusion by the Medical Council and subsequent appeal process. The Court cannot on this record conclude that the decision made was arbitrary and capricious. In-

deed, it is apparent that the Student Promotions Committee made the decision regarding petitioner only with reluctance and after careful and considerable deliberation.

One of the first witnesses called by petitioner was Dr. Jean Jew, a professor of anatomy at the University of Iowa College of Medicine. Petitioner asked the Court to take judicial notice of the recent lawsuit which Dr. Jew successfully prosecuted against the College of Medicine. Dr. Jew was coincidentally one of the five members of the Student Promotions Committee which voted unanimously to dismiss petitioner from the College of Medicine. While the facts underlying Dr. Jew's claim of sexual harassment are arguably quite different than the claims being

made by petitioner, it is obvious that if anyone would have been sensitive to sexually discriminatory criteria being applied to a female student, it would be Dr. Jew. In fact, Dr. Jew testified that she scrutinized petitioner's records and evaluations to be certain in her own mind that sex discrimination was not a factor. Dr. Jew concluded that in petitioner's case only valid academic criteria were being applied. This Court reaches the same conclusion, and considers the testimony of Dr. Jew to be particularly persuasive in support of the determination reached by the College of Medicine to dismiss petitioner.

For all of the foregoing reasons, the decision of the respondent is hereby AFFIRMED.

Dated this 11th day of April, 1991.

/s/ Robert A. Hutchison

Robert A. Hutchison, Judge-
Fifth Judicial District of
Iowa

IN THE DISTRICT COURT OF IOWA IN AND FOR POLK COUNTY

KAREN R. LUNDE,	:	CASE NO. AA 1583
Petitioner,	:	RULING ON PETIT-
v.	:	IONER'S MOTION
STATE BOARD OF	:	FOR NEW TRIAL,
REGENTS,	:	RECONSIDERATION,
Respondent.	:	OR OTHER APPRO-
	:	PRIATE RELIEF

On this 30th day of April, 1991, petitioner's motion for new trial, reconsideration or other appropriate relief comes before the Court. Having reviewed petitioner's motion and the court file, and being fully advised in the premises, the Court now enters the following ruling.

The essence of petitioner's motion is that the Court erred in its ruling

of April 11, 1991, in that it failed to understand the thrust of petitioner's case and "ignored virtually all of the evidence . . . and all of the legal authorities supporting her case." The Court did not ignore the evidence or the authorities presented by petitioner. However, the Court did find that the evidence petitioner presented did not establish the claims she was making, and consequently found the authorities she cited to be inapposite.

The Court in its ruling of April 11, 1991 intended to make clear that it found no factual basis to support petitioner's claims that she was dismissed from the University of Iowa Medical School either because of sex discrimination or the exercise of her First Amendment rights. The reason the Court found

the "mixed-motives" cases cited by petitioner to be irrelevant is precisely because the Court found sex discrimination and first amendment rights to have played no role whatsoever in petitioner's dismissal. Finally, the Court did consider petitioner's equal protection argument, and also finds no factual or legal basis to support her position.

Petitioner's motion for new trial, for reconsideration or for other appropriate relief is overruled on each and every ground urged.

Dated this 30th day of April, 1991.

/s/ Robert A. Hutchison

Robert A. Hutchison, Judge-
Fifth Judicial District of
Iowa

IN THE COURT OF APPEALS OF IOWA

No. 1-634 / 91-760

Polk County Civil No. AA 1583

O R D E R

KAREN R. LUNDE,

Appellant,

vs.

IOWA BOARD OF REGENTS,

Appellee.

Appellants' [sic] Petition for Rehearing is hereby denied.

Done this 2 day of April, 1992.

/s/ Leo Oxberger

Leo Oxberger
Chief Judge

IN THE SUPREME COURT OF IOWA

No. 91-760

Polk County No. AA 1583

O R D E R

KAREN R. LUNDE,

Petitioner-Appellant,

vs.

IOWA BOARD OF REGENTS,

Respondent-Appellee.

After consideration by this court en banc, Lavorato, J., not participating, further review of the above-captioned case is hereby denied.

Dated this 28th day of May, 1992.

THE SUPREME COURT OF IOWA

/s/ Arthur A. McGiverin

By_____
Arthur A. McGiverin, Chief Justice